

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 9, 2005

IN RE:

**PETITION OF CHATTANOOGA GAS COMPANY,
NASHVILLE GAS COMPANY, A DIVISION OF
PIEDMONT NATURAL GAS COMPANY, INC., AND
UNITED CITIES GAS COMPANY, A DIVISION OF
ATMOS ENERGY CORPORATION FOR A
DECLARATORY RULING REGARDING THE
COLLECTIBILITY OF THE GAS COST PORTION OF
UNCOLLECTIBLE ACCOUNTS UNDER THE
PURCHASED GAS ADJUSTMENT (PGA) RULES**

**DOCKET NO.
03-00209**

**ORDER DENYING CONSUMER ADVOCATE'S MOTION FOR SUMMARY
JUDGMENT, GRANTING, IN PART, AND DENYING, IN PART, PETITIONERS'
MOTION FOR SUMMARY JUDGMENT, DENYING PETITION FOR A
DECLARATORY RULING AND MODIFYING REFUND ADJUSTMENT FORMULA**

This matter came before Chairman Deborah Taylor Tate, Director Pat Miller and Director Ron Jones of the Tennessee Regulatory Authority ("Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on February 9, 2004, for consideration of motions for summary judgment filed by the Consumer Advocate and Protection Division of the Attorney General ("Consumer Advocate") and Chattanooga Gas Company, Nashville Gas Company and United Cities Gas Company (collectively, the "Petitioners" or "Gas Companies"). Upon review of the record in this proceeding, including consideration of the parties' oral arguments and post-hearing briefs, the motion for summary judgment filed by the Consumer Advocate is denied and the motion for summary judgment filed by the Gas Companies is granted in part and denied in part.

The resolution of both motions for summary judgment and the findings and conclusions made in regard to those motions are conclusive on the issues raised by the Gas Companies in their *Petition for Declaratory Ruling*. Therefore, for the reasons stated below, the Gas Companies' *Petition for Declaratory Ruling* is denied.

The Refund Adjustment Formula set forth in Tenn. Comp. R. & Regs. 1220-4-7-.03(1)(b)1. is modified pursuant to Tenn. Comp. R. & Regs. 1220-4-7-.03(1)(b)3. to allow the Petitioners to recover all gas costs, including those that are billed and uncollectible. The modified formula will become applicable to the Petitioners thirty (30) days after February 9, 2004, absent further action by the Authority. All interested parties were directed to file any comments on the modified Refund Adjustment Formula no later than thirty days following February 9, 2004. This Docket will remain open, and at the end of one (1) year, the Authority will consider altering or making the modified formula permanent and applicable to all gas companies through a rulemaking or otherwise.

BACKGROUND

On March 17, 2003, the Gas Companies filed a *Petition for Declaratory Ruling*¹ pursuant to Tenn. Code Ann. § 65-2-104 (2004), Tenn. Code Ann. § 4-5-223 (1998) and Tenn. Comp. R. & Regs. 1220-1-2-.06, asking the Authority for a ruling that the gas cost portion of uncollectible accounts is properly recoverable pursuant to Tenn. Comp. R. & Regs. 1220-4-7, the Purchase Gas Adjustment ("PGA") Rules.²

¹ The Gas Companies amended the *Petition for Declaratory Ruling* on July 31, 2003. See *Amendment to Petition for Declaratory Ruling* (July 31, 2003).

² The objectives of the PGA are to permit any gas utility to recover, in timely fashion, the total cost of gas purchased for delivery to customers and to assure that the gas utility does not over-collect or under-collect gas costs from its customers. Tenn. R. & Regs. 1220-4-7-.02(1). In the past, uncollected gas costs have been recovered through the base utility tariff rates instead of the PGA mechanism.

The rates for gas service set forth in the rate schedule for a gas company are adjusted pursuant to the PGA Rules or any portion of the PGA Rules as determined by individual rate schedules.³ The PGA consists of three (3) major components: the Gas Charge Adjustment, the Refund Adjustment and the Actual Cost Adjustment (“ACA”).⁴ Gas utilities are allowed a certain amount in their base rates for uncollectible accounts, including the gas portion and non-gas portion of customer charges. If the actual uncollectible accounts exceed the amount in the reserve in base rates from their last rate case, the Gas Companies absorb the loss and, if the accounts are less than the reserve amount, the Gas Companies keep the excess.⁵

In the *Petition for Declaratory Ruling*, the Gas Companies contend that the gas portion of uncollectible accounts is properly recoverable pursuant to Tenn. Comp. R. & Regs. 1220-4-7 and, therefore, the Gas Companies sought to recover the gas costs portion of net write-offs for each fiscal year in their PGA. Until their next general rate cases, the Gas Companies suggested that to the extent the gas costs portion of net write-offs for a fiscal year exceeded the gas cost portion of uncollectible accounts allowed in their base rates, the unrecovered portion would be included in the Gas Companies’ individual ACA filings. The Gas Companies would remain at risk for the distribution cost (margin) portion included in base rates. However, to the extent the gas costs portion of net write-offs for a fiscal year are less than the gas cost portion of uncollectible accounts included in their base rates, the difference would be credited to customers through the Gas Companies’ ACA filings. The Gas Companies have asked the Authority for a ruling that, in future rate cases, only the non-gas portion of uncollectible accounts would be

³ Tenn Comp R & Regs 1220-4-7- 02(4)

⁴ Tenn Comp R & Regs 1220-4-7- 03(1)

⁵ See *Petition for Declaratory Ruling*, pp 3-4 (March 17, 2003)

included in their base rates, while the gas costs portion would be collected along with all other gas costs through the PGA and reconciled with the ACA filing.⁶

The Consumer Advocate filed a *Petition to Intervene* on April 21, 2003, which was subsequently granted by the Authority on April 24, 2003. In its *Petition to Intervene*, the Consumer Advocate argued that the PGA Rules do not allow recovery of uncollectible accounts as part of the “cost of gas” and asserted that the Gas Companies’ request would be a violation of TRA Rules.⁷

THE PARTIES’ MOTIONS FOR SUMMARY JUDGMENT

The Consumer Advocate filed a Motion for Summary Judgment and a Memorandum in Support of Motion for Summary Judgment on October 1, 2003. The Consumer Advocate argued that: (1) a plain reading of the rules does not allow for recovery of the gas cost portion of the uncollectible accounts; (2) TRA precedent allows for waiver or alteration of policy and rules only upon evidence of extraordinary circumstances; and (3) a rulemaking proceeding would be the appropriate mechanism for the relief the Petitioners are seeking.

On October 27, 2003, the Gas Companies filed a Motion for Summary Judgment and their Response in Opposition to the Consumer Advocate’s Motion for Summary Judgment. The Gas Companies argued that: (1) the intent of the PGA Rules is to permit gas companies to recover their total gas costs; (2) the *Petition for Declaratory Ruling* is not moot as alleged by the Consumer Advocate⁸ and is properly before the TRA pursuant to Tenn. Code Ann. § 65-2-104 (2004), § 4-5-222 (1998) and Tenn. Comp. R. & Regs. 1220-1-2-.05 inasmuch as the Petitioners

⁶ See *Petition for Declaratory Ruling*, p. 4 (March 17, 2003)

⁷ *Petition to Intervene*, p. 2 (April 21, 2003)

⁸ The Consumer Advocate alleges that because the rules do not allow inclusion of uncollectible accounts, a declaratory order seeking an interpretation concerning the gas portion of uncollectible accounts related to the PGA is moot. See *Memorandum in Support of Motion for Summary Judgment by the Consumer Advocate and Protection Division of the Office of the Attorney General*, p. 2 (October 1, 2003)

seek a ruling with respect to the applicability of the PGA Rules to their factual circumstances; (3) a waiver of the PGA rules is not necessary to allow recovery of the gas cost portion of uncollectible accounts; and (4) the interpretation of the PGA Rules sought by the Petitioners does not require a rulemaking proceeding.

In addition, the Gas Companies argued that the Consumer Advocate's Motion for Summary Judgment should be denied for failure to submit a separate concise statement of undisputed material facts or to provide a specific citation to the record in support of the Motion in compliance with Rule 56.03 of the Tennessee Rules of Civil Procedure ("TRCP"). The Gas Companies also argued that the Consumer Advocate had not affirmatively negated an essential element of the Petitioners' claim or established an affirmative defense that conclusively defeated the Petitioners' claim.

The Consumer Advocate filed a *Reply Memorandum to Petitioners' Response in Opposition to the Motion for Summary Judgment by the Consumer Advocate and Protection Division* on November 3, 2004 and a *Response in Opposition to the Petitioners' Motion for Summary Judgment* on November 20, 2003. Oral arguments on the motions for summary judgment were held before the voting panel on December 11, 2003. The parties filed post-hearing briefs on December 17, 2003.

MOTION TO STRIKE UNSUBSTANTIATED STATEMENTS IN AFFIDAVIT

The *Affidavit of Daniel W. McCormac in Support of Motion for Summary Judgment* ("McCormac Affidavit") was filed on November 3, 2003 by the Consumer Advocate as Exhibit A to the *Reply Memorandum to Petitioners' Response in Opposition to the Motion for Summary Judgment by the Consumer Advocate and Protection Division*. The Gas Companies asked the Consumer Advocate to supplement its responses to discovery requests in order to determine the

basis of certain facts contained in the *McCormac Affidavit*.⁹ The Consumer Advocate filed a supplemental discovery response on November 25, 2003. Thereafter, on December 4, 2003, the Gas Companies filed *Petitioners' Motion to Strike Unsubstantiated Statements in the Affidavit of Daniel McCormac* ("Motion to Strike"). The *Motion to Strike* was pending at the time of oral arguments on the motions for summary judgment held on December 11, 2003, and was taken under advisement during that proceeding.¹⁰

STANDARD FOR SUMMARY JUDGMENT

TRCP 56.04 provides that summary judgment is appropriate when: (1) no genuine issues with regard to the material facts relevant to the claim remain to be tried; and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts.¹¹ The moving party bears the burden of proving that its motion satisfies these requirements.¹² To properly support its motion, the moving party must either affirmatively negate an essential element of the nonmovant's claim or conclusively establish an affirmative defense.¹³

After a properly supported motion for summary judgment is asserted, the burden shifts to the nonmovant to respond with evidence establishing the existence of specific, disputed, material facts which must be resolved by the trier of fact.¹⁴ Thus, even if the moving party successfully negates a claimed basis for the action, the nonmovant may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim. If the

⁹ Counsel for Atmos requested supplementation from the Consumer Advocate by letter dated November 24, 2003 *Petitioners' Motion to Strike Unsubstantiated Statements in the Affidavit of Daniel McCormac*, p. 2 (December 4, 2003)

¹⁰ At the beginning of oral arguments on the motions for summary judgment, the status of the *Motion to Strike* was discussed by the parties and the *Motion to Strike* subsequently was taken under advisement by the voting panel. See Transcript of Proceedings, pp. 4-6 (December 11, 2003)

¹¹ See *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000), see also TRCP 56.04

¹² See *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991)

¹³ See *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998), *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997)

¹⁴ See *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)

moving party fails to negate a claim, the nonmovant's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail.¹⁵

In reviewing a motion for summary judgment, the evidence and all reasonable inferences drawn from the evidence must be viewed in a light most favorable to the non-moving party.¹⁶ Summary judgment is appropriate only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion.¹⁷

FINDINGS AND CONCLUSIONS

The Gas Companies argue that the Consumer Advocate's Motion for Summary Judgment should be denied for failure to comply with TRCP 56.03 which requires that

In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure shall be accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by a specific citation to the record.

The provisions of TRCP 56.03 are designed to aid the decision maker in determining whether there are any material facts in dispute. Here, the Gas Companies agree that there are no disputed material facts in this matter.¹⁸ Therefore, the Authority declines to strictly enforce the provisions of TRCP 56.03 in regard to the Consumer Advocate's Motion for Summary Judgment. The Authority finds that there are no disputes as to any material fact in this matter

¹⁵ See *McCarley v West Quality Food Serv*, 960 S W 2d 585, 588 (Tenn 1998), *Robinson v Omer*, 952 S W 2d 423, 426 (Tenn 1997)

¹⁶ See *Webber v State Farm Mut Auto Ins Co*, 49 S W 3d 265, 269 (Tenn 2001)

¹⁷ See *Carvell v Bottoms*, 900 S W.2d 23, 26 (Tenn 1995)

¹⁸ *Petitioners' Response in Opposition to Motion for Summary Judgment of the Consumer Advocate and Protection Division*, p 3, footnote 2 (October 27, 2003)

and that the only questions presented are interpretations of law. Therefore, this Docket may be decided properly by the granting or denying of the parties' motions for summary judgment.

Tenn. Comp. R. & Regs. 1220-4-7-.02(1), reads as follows:

The Purchase Gas Adjustment (PGA) Rules are intended to permit the gas company to recover, in timely fashion, the total cost of gas purchased for delivery to its customers and to assure that the company does not over-collect or under-collect Gas Costs from its customers.

The Authority interprets Tenn. Comp. R. & Regs. 1220-4-7-.02(1) to mean that the intent of the PGA Rules is to allow for recovery of all gas costs, including those that are billed and uncollectible. The Authority further finds that although the PGA Rules as currently written generally reflect the stated intent of the rules to allow for recovery of all gas costs, the Refund Adjustment Formula set forth in Tenn. Comp. R. & Regs. 1220-4-7-.03(1)(b)1. does not provide for the recovery of the gas costs portion of uncollectible accounts and therefore does not reflect that intent.

Rule 1220-4-7-.03(1)(b)3. states:

3. Modification of Formula. The formulas set forth above are not designed for use with two-part demand/commodity rate schedules; however, the formulas may be modified from time to time to carry out the intent of these PGA Rules. Any proposed modification to the formulas shall contain a proposed effective date. The Authority may suspend the modification within thirty (30) days of filing, in which case the proposed modification shall be subject to notice and hearing; otherwise, the modification to the formula shall be effective on the proposed effective date.

Under the Authority's interpretation of Rule 1220-4-7-.03(1)(b)3., the Authority finds it may modify its own Refund Adjustment Formula without a waiver of a rule or without a rulemaking proceeding.

Based upon the findings set forth above, the Authority concludes that the Gas Companies are entitled to Summary Judgment as a matter of law only as to the following:

- (a) The intent of the PGA Rules is to permit the gas companies to recover their total gas costs;
- (b) A waiver of the PGA Rules is not necessary to allow recovery of the gas cost portion of uncollectible accounts;
- (c) The interpretation of the PGA Rules sought by the Petitioners does not require a rulemaking procedure; and
- (d) The *Petition for Declaratory Ruling* is not moot and is properly before the TRA.

The Authority concludes that the remainder of the Petitioners' Motion is without merit and therefore should be denied.

Based upon the findings set forth above, the Authority further concludes that the Consumer Advocate is not entitled to Summary Judgment as a matter of law. Therefore, the Consumer Advocate's Motion for Summary Judgment should be denied.¹⁹

In their *Petition for Declaratory Ruling*, as amended, the Gas Companies request the Authority to declare that the gas costs portion of their uncollectible accounts is recoverable through the PGA Rules or pursuant to procedures consistent with the intent of the PGA rules. Based on the Authority's finding that the Refund Adjustment Formula set forth in Tenn. Comp.

¹⁹ Director Jones did not agree with this conclusion. Instead, he finds that in its motion for summary judgment, the Consumer Advocate asserts that a "plain reading of the PGA Rules shows that uncollectible accounts are not included within the framework of the PGA Rules." *Motion for Summary Judgment by the Consumer Advocate & Protection Division of the Office of the Attorney General*, p. 1 (October 1, 2003). Although Director Jones agrees that a plain reading of the PGA Rules demonstrates that the intent of the rules is to allow gas companies to recover all of their gas costs, including the gas cost portion of uncollectible accounts, he does not agree that the factors for calculating gas costs set forth in the rules include the gas cost portion of the uncollectible accounts. Thus, he concludes the Consumer Advocate's assertion is correct in part, and it should be granted summary judgment as to this narrow issue. In fact, to find otherwise would negate the need to modify the Refund Adjustment Formula.

R. & Regs. 1220-4-7-.03(1)(b)1. of the PGA Rules does not provide for the recovery of the gas costs portion of uncollectible accounts, the Authority concludes it cannot declare based on the express language of the rules that the gas cost portion of the uncollectible accounts is recoverable. Nor does the mere existence of a procedure for the modification of the Refund Adjustment Formula, absent such a modification by the Authority, allow for the recovery of the gas costs portion of uncollectible accounts. Therefore, the Authority concludes that the *Petition for Declaratory Ruling* should be denied.

As noted, Tenn. Comp. R. & Regs. 1220-4-7-.03(1)(b)3. provides that the Authority may modify the Refund Adjustment Formula from time to time in order to carry out the intent of the PGA Rules. The Authority finds that the Refund Adjustment Formula should be modified to reflect the intent of the PGA Rules by allowing for the recovery of uncollected gas costs that are both billed and determined to be uncollectible. Therefore, the following formula is adopted and applied to the Petitioners in this Docket in place of the Refund Adjustment Formula found in Tenn. Comp. R. & Regs. 1220-4-7-.03(1)(b)1. and will take effect after the thirty-day comment period commencing from February 9, 2004, absent further action from the Authority:

$$FirmRA = \frac{(DR_1 - DR_2)}{(SFR)} + \frac{(CR_1 - CR_2 \pm CR_3 \pm U \pm i)}{(STR)}$$

$$Non - FirmRA = \frac{(CR_1 - CR_2 \pm CR_3 \pm U \pm i)}{(STR)}$$

Where U = The difference in the actual gas cost portion of Uncollectible Expense from that approved in the last rate case.

As a result of the modification of the Refund Adjustment Formula, the Petitioners shall be allowed to recover their actual uncollected gas costs in excess of the amounts of uncollected gas costs that were approved in the last rate case for each of the Gas Companies or shall refund

the amounts that are less than the uncollected gas costs that were forecast in the Gas Companies' most recent rate cases. Pursuant to Tenn. Code Ann. § 65-4-111(a) (2004), the Gas Companies shall adjust their accounting to record and segregate their uncollectible expenses into gas cost and margin components.

This docket will be left open for approximately one (1) year, at which time the panel will reconvene to determine if these changes were successfully implemented and whether they should either be altered or permanently adopted in the TRA rules. TRA staff will monitor these changes regularly and make a recommendation on any needed alterations to or permanent adoption of the changes at the end of the one-year period. After analysis has been completed and if the Authority permanently adopts any needed alterations or changes, the modified formula may be applicable to all gas utilities under the Authority's jurisdiction.

At the end of the comment period, absent further action from the Authority, the Petitioners may proceed with accounting for the uncollectible gas costs. The formula will remain in effect until such time as the Authority reconsiders the issue.


The Authority finds that the assertions contained in the *McCormac Affidavit* are immaterial facts for the purpose of the disposition of the motions for summary judgment. In addition, the assertions were not relied upon by the Authority in reaching a decision on the motions for summary judgment. As a result of the decision on the motions for summary judgment, the *Motion to Strike Unsubstantiated Statements in the Affidavit of Daniel McCormac* is rendered moot and therefore should be denied.


IT IS THEREFORE ORDERED THAT:

1. The Consumer Advocate's Motion for Summary Judgment is denied;
2. The Gas Companies' Motion for Summary Judgment is granted in part and denied in part, as stated above;
3. The Gas Companies' *Petition for Declaratory Ruling* is denied;
4. The Refund Adjustment Formula set forth in Tenn. Comp. R. & Regs. 1220-4-7-.03(1)(b)1. is modified as indicated in this Order and is applicable to the Petitioners at the end of thirty (30) days from February 9, 2004, unless otherwise ordered by the Authority;
5. Any interested party may file comments concerning the modified Refund Adjustment Formula within thirty (30) days after February 9, 2004;
6. Pursuant to Tenn. Code Ann. § 65-4-111(a) (2004), the Gas Companies shall adjust their accounting to record and segregate their uncollectible expenses into gas cost and margin components;
7. This docket will be left open for one (1) year to determine if the modified Refund Adjustment Formula was successfully implemented by the Petitioners in this Docket. At the end of one (1) year, the panel in this docket shall reconvene as soon as practicable to consider whether such modified formula should either be altered or permanently adopted in the TRA rules through a rulemaking proceeding or otherwise;
8. The Gas Companies' *Motion to Strike Unsubstantiated Statements in the Affidavit of Daniel McCormac* is moot and is therefore denied;
9. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days from the date of this Order; and

10. Any party aggrieved by the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.


Deborah Taylor Tate, Chairman


Pat Miller, Director


Ron Jones, Director